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OCT 23 1891
JAMES H. McKENNEY.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891.

IN EQUITY—No. 60.

A. H. JOHNSON,
Appellant,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF FOR THE RAILWAY COMPANY ON MOTION TO DISMISS THE APPEAL.

JOHN F. DILLON,
WINSLOW S. PIERCE,
Of Counsel.

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vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

BRIEF FOR THE APPELLEE ON MOTION TO DISMISS THE APPEAL.

Statement.

The object of this suit is to enjoin the appellant Johnson from attempting to take possession of or interfering with 18 miles of railroad track belonging to the appellee in the State of Arkansas. The Court below, upon the pleadings and proofs, granted the injunction as prayed for in the bill. The defendant Johnson appealed to this Court. The appellee has moved to dismiss the appeal for the following reasons:

FIRST. Because there has not been transmitted to this Court, or filed with the transcript of record in this

cause any assignment of errors, as required by Section 997 of the Revised Statutes of the United States.

SECOND. Because the transcript of record filed in this cause contains no exceptions to testimony or rulings of the Court upon matters of law.

THIRD. Because the transcript of record filed in this cause does not show that said appellant has furnished security to prosecute his appeal to effect, as is required by Section 1000 of the Revised Statutes of the United States.

ARGUMENT.

I.

Section 1012 of the U. S. Revised Statutes provides as follows:

"Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error."

By Section 997 of the U. S. Revised Statutes it is provided that

"There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."

Benites vs. Hampton, 123 U. S., 519.
Dugger vs. Taylor, 121 U. S., 286.
Boston Mining Co. vs. Eagle Mining Co., 115 U. S., 221.

II.

Section 1000 of the U. S. Revised Statutes is as follows:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

Boyce vs. Grundy, 6 Pet., 777.

But it seems that under the present rulings an appeal will not be dimissed for want of security except on failure to comply with an order to give proper security within such reasonable time as the Court may prescribe.

Seymour vs. Freer, 5 Wall., 822.
Brobst vs. Brobst, 2 Wall., 96.

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A. H. JOHNSON, *Appellant,* *vs.* THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.	NO. 60.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, *Appellant,* *vs.* A. H. JOHNSON.	NO. 71.

BRIEF FOR THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

IN EQUITY.

A. H. JOHNSON, Appellant, vs. THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.	No. 60.
THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant, vs. A. H. JOHNSON.	No. 71.

Brief for the St. Louis, Iron Mountain and Southern Railway Company.

STATEMENT.

These are separate appeals taken by the complainant and the defendant from a decree rendered in an action brought by the St. Louis, Iron Mountain and Southern Railway Company to enjoin the defendant A. H. John-

son from any interference with eighteen miles of complainant's track from Mariana, Arkansas, in the direction of Helena, Arkansas.

In 1879 Johnson entered into a contract with the Iron Mountain and Helena Railroad Company for the building of the said eighteen miles of track, the consideration named being $29,000, and the contract providing that, until said sum should be fully paid, Johnson should have the possession of the said railroad and should "have the right to run, use and control the same."

Having completed the road and not having been fully paid according to the terms of the contract, he was in possession of the property, holding it as security, when, in September, 1880, he was forcibly dispossessed by one William Bailey, president of the Iron Mountain and Helena Railroad Company. Johnson brought his action for forcible entry and detainer, and while it was pending in the trial court, and on October 26, 1882, the complainant in this action purchased the railroad and other property of the Iron Mountain and Helena Railroad Company, a part of the railroad so purchased being the eighteen miles above referred to, taking possession thereof December 15, 1882, and was made a party defendant to the possessory action. In that action judgment was rendered on March 14th, 1883, for the plaintiff and was affirmed by the Supreme Court of the United States in January, 1887 (119 U. S., 608).

Johnson took no immediate steps to take possession of the eighteen miles of road under his judgment.

Before the purchase of the property of the Iron

Mountain and Helena Railroad Company by the St. Louis and Iron Mountain and Southern Railway Company, and on October 6th, 1881, Johnson and the first-named company made and signed (the corporation acting by William Bailey, its president,) a certain agreement as follows, being "Exhibit A," page 34, of the transcript.

It is agreed between A. H. Johnson and the Iron Mountain and Helena Railroad Company, as follows, viz: That the amount due said Johnson for constructing that part of said Iron Mountain and Helena Railroad between the former junction with the Arkansas Midland Railroad and the Town of Marianna under a contract executed in April, 1879, is the sum of $25,000 at this date; and it is further agreed that the suit now pending in the United States District Court for the Eastern District of Arkansas, at Helena, is to be continued at the October Term, A. D. 1881.

IRON MOUNTAIN AND HELENA R. R. CO.,
Per WM. BAILEY,
President.
A. H. JOHNSON.

In August, 1887, about seven months after the affirmance of the judgment by the Supreme Court, the St. Louis, Iron Mountain and Southern Railway Company through its attorneys, tendered to Johnson, in full settlement of his account under the contract, the sum of $33,825, being the sum named in said agreement, with lawful interest thereon from its date; and the same having been refused, instituted the present action for an injunction against interference by Johnson with the possession of the eighteen miles of track.

A restraining order was granted *ex parte*, the complainant being required to pay into the depository of the Court the sum so tendered (the same being subject

to the order of Johnson), and the costs in the possessory action.

The defendant Johnson, by answer, alleges that the agreement of October 6th, 1881, was not in the nature of an account stated, but was, and was intended to be, conditional and temporary and that the condition had not been fulfilled. A replication in the usual form was filed. The Court below found for the complainant upon the testimony and proofs, and granted the injunction as prayed, but upon condition that complainant "pay into the registry of the Court the costs of this suit and the sum of one thousand dollars for the amount expended by the defendant in making necessary preparations to take possession of the eighteen miles of railroad mentioned in the bill."

This was in addition to the sum of $33,825, tendered to Johnson and put into the registry of the Court for his purposes and which the Court ordered (Tr., p. 9), that the defendant might "demand and receive whenever he shall be pleased to do so without prejudice to any of his rights."

Both parties appealed from the decree.

ARGUMENT.

I.

A.

The agreement of October 6th, 1881, was a settlement of the amount due to the defendant Johnson and is binding upon him.

B.

But if it were otherwise he is estopped as against the complainant, to deny that it was such a settlement by reason of the use which he made of it, his representations concerning it to the complainant, and its action upon the faith of such representations.

C.

If both the foregoing propositions are unsound, the amount tendered and paid into the registry of the Court for Johnson, and allowed to be paid to him, is every cent that he is equitably entitled to, and the part of the decree appealed from by Johnson should be affirmed.

As the facts relating to these several propositions run together we will discuss the propositions under the same head together.

The construction contract, dated April 23d, 1879, between The Iron Mountain and Helena Railroad Com-

pany and Johnson (Tr., p. 5) recites that the railroad company had purchased a sufficient quantity of iron rails, &c., to lay its track upon the eighteen miles of road above referred to, and had a roadbed partially graded. By the terms of that contract Johnson agreed *to complete* the grading, bridging, &c., upon said eighteen miles of road, the railroad company furnishing the rails, fastenings, spikes and switches as the same might be needed. By far the larger expense of constructing the road was to be, and was, borne by the railroad company, as must be apparent when it is seen that at the contract price of $29,000 Johnson was to be paid only about $1,600 per mile, while the average cost of building railroads is several times that sum per mile. The contract of April, 1879, last above referred to, also provided that all moneys collected from citizens of Helena who had subscribed to aid in building the road should be paid directly to Johnson, and that such payments should be in discharge *pro tanto* of the contract (Tr., p. 6). It does not appear from the record how much money was collected by Mr. Johnson from the citizens of Helena under this clause of the contract, but his willingness to accept a sum less than $29,000 is, to all intents and purposes, an admission on his part that he received some money from that or other sources.

Under these circumstances the agreement of October 6, 1881 (introduced in evidence as Exhibit A, Tr. 34), was entered into between defendant Johnson and the Iron Mountain and Helena Railroad Company by William Bailey, its president. This occurred a year before the present complainant the St. Louis, Iron Mountain and Southern Railway

Company was in any way interested in the property affected by it. There is no evidence in the record that prior to the purchase of the property of the Iron Mountain and Helena Railroad Company by the complainant in October, 1882, the complainant or any of its officers or agents had any knowledge whatever of the circumstances under which this agreement was made. After the time when this complainant purchased the property of the Iron Mountain and Helena Railroad Company the defendant himself produced the agreement and exhibited it to Mr. Merriam, the attorney and agent of the complainant, at their first meeting in February, 1883. Mr. Merriam's testimony (Tr., 23) is as follows:

A. To the best of my recollection, the first time I met Mr. A. H. Johnson was just about five years ago this present month, that is to say, February, 1883. Mr. Johnson came to the general solicitor's office of the St. Louis, Iron Mountain and Southern Railway Company in St. Louis, in this building, and introduced himself to me. He came alone, as I recollect, and opened up the subject of his claim against the Iron Mountain and Helena Railroad, which at that time the St. Louis, Iron Mountain and Southern Railway Company had possession of and was operating, having acquired it by purchase in the fall of the preceding year. I asked Mr. Johnson what was the amount of his claim, and he, in answer to my question, exhibited to me an agreed statement of account between himself and the Iron Mountain and Helena Railroad Company, by Wm. Bailey, president, which I have here and will attach a copy of same as an exhibit to my testimony, identifying it as "Exhibit A."

Mr. Merriam further testifies (Tr., 25) as follows:

Q. When Mr. Johnson produced the contract of settlement which you have referred to and copy of which you have attached to your deposition as "Exhibit A," between himself and the Iron Mountain and Helena

Railroad Company, did he make mention of any collateral or verbal agreement and understanding had between himself and the president of the Iron Mountain and Helena Railroad Company, by virtue of which the agreement had become a nullity?

A. He did not; on the contrary, all that was said by Mr. Johnson on the occasion of his visit to the general solicitor's office in February, 1883, was to the effect that this agreed statement of account represented what was due him as a fact from the Iron Mountain and Helena Railroad Company, and nothing was said on that occasion to, in the slightest degree, impair the conclusiveness of that statement upon both parties to it.

As to this exhibition of the agreement, Mr. Johnson, the defendant, practically confirmed what was testified to by Mr. Merriam. He says (Tr., pp. 48 and 49):

A. I exhibited that paper to Mr. Merriam in 1883, at that interview referred to by him. I went to St. Louis at the request of Capt. Hays or Mr. Merriam, both officers of the Iron Mountain road, I don't remember which, to see if we couldn't settle. Mr. Merriam said that they could pay me whatever Mr. William Bailey would acknowledge was due me, but that it was not more than $12,000 or $15,000; that Mr. Bailey had said that he could settle with me for $12,000, and not to exceed $15,000 at the outside. I had this paper in my possession and showed it to Mr. Merriam, and told him that Mr. Bailey had agreed to that amount at one time, but had failed to make it good, and that it was impossible for me to come to any settlement with Mr. Bailey—to come to any agreement or fix on any amount he would allow—and that I would not try to, as I was satisfied that he would not agree to any amount that would satisfy me. I exhibited this paper, not because it had any binding force on me at that time or on any one. I didn't suppose it had. Its conditions had been violated, and I had no belief that the paper had any binding force. I merely exhibited it to Mr. Merriam to convince him that I could come to no understanding with Bailey. I put it in my pocket, and it remained there until my attorney called for it in my forcible entry and detainer case afterward against the Iron Mountain road.

CROSS-EXAMINATION OF A. H. JOHNSON BY MR. DODGE (pp. 49–50):

1 Q. You state that at the time you showed this written stipulation to Mr. Merriam that you had certain views as to whether that paper was then of any validity or not. Did you express those views to Mr. Merriam as you have expressed them in your deposition of to-day?

A. I don't believe I did. I have no recollection upon that matter.

2 Q. Have you any recollection of anything having been said as to whether that paper was of any binding force upon Mr. Bailey or yourself?

A. I don't think I discussed it. My opinion as to the validity of the paper was obtained from Major Hornor.

3 Q. At what time did you ever obtain any opinion from Major Hornor as to the validity of this paper?

A. My recollection is that I obtained my information from Major Hornor at the time this paper was written. When I objected to signing such a paper with Mr. Bailey and before I signed it, Major Hornor told me that it would not bind me in any way beyond the time specified. I think we talked it over whether the paper was of any binding force or not, and that I acknowledged that it was not and that I didn't care to have that govern me in the settlement at all; and in proof of that we offered to settle afterward, or at that time, for $21,000.

4 Q. I understand you to say now that you do recollect having discussed the validity of this paper with Merriam. Is that the case?

A. The more I think it over, the more it comes to my mind that I did. I did not remember showing that paper to Mr. Merriam till I heard his testimony, and that brought it to my mind.

5 Q. Do you recollect that you in any manner represented that paper at that time as being of no validity?

A. I do not.

It is clear, therefore, from the record, that Mr. Johnson, in February, 1883, attached so much importance to this agreement that he used it on the occasion in

question to influence the mind of Mr. Merriam, the agent of the complainant. We next hear of this agreement having been produced in evidence by Mr. Johnson upon the trial of the possessory action in March, 1883. This is specially alleged in defendant's answer (Tr. p. 13), and is testified to in the cross-examination of Mr. Merriam (Tr. p. 32), by Mr. Johnson (Tr. p. 42), and also by Major Horner on his cross-examination (Tr. p. 53).

In April, 1883, Major Horner, counsel for defendant, in a conversation with Mr. Merriam, representing complainant, referred to the agreement as showing the amount due his client, and proceeded to discuss terms of settlement (Tr. p. 26).

Again, in May, 1883, we find the attorneys of the defendant, in their reply to a letter from the complainant's counsel, referring to the agreement as a settlement of defendant's claim. Their language is as follows: "Mr. Johnson writes that he is willing, if settlement is made now, to figure the debt and interest to date of settlement, and receive Iron Mountain 5% at market price, whatever that might be at the time of settlement, *meaning the debt at $25,000, on the 6th of October, 1881, as settled by the writing of Col. Bailey*" (Tr., p, 38).

Mr. Horner testifies, concerning this letter, as follows (Tr. pp. 52, 53):

"I wrote it myself some time in May, 1883; it contains Johnson's reply, in which he says he will take $25,000 at 6% interest from the 6th day of October, 1881. That was the substance of Johnson's letter to me, and was what I advised him. After we left St. Louis I told him never to take less than that, and in that letter I said, *as the reason for the advance from $21,000 to $25,000, that that was the sum at which Bailey and Johnson had settled.* I gave that as a

reason for advancing the amount that they had settled at that sum."

It thus appears that down to May, 1883, Major Horner, by the express direction of Johnson, treated the agreement of October 6th, 1881, at $25,000 as being a settlement which was then in force and binding.

Quite aside from any question of estoppel on Johnson, if he, in 1883, or at any time, assented to or treated the agreement of October 6, 1881, as one which he was entitled to the benefit of, it thence and thereforward forever became binding upon him.

We submit, therefore, that the testimony shows that up to May, 1883, the defendant and his counsel used this agreement whenever it suited their purpose in their interviews and intercourse with the complainant's agents, without making any suggestion or in any way intimating that it was restricted in its force and effect by any limitation as to time of payment or in any other way. As to this complainant it was a solemn admission on the part of the defendant that he had agreed with the prior owner of the property that the amount due him under his original contract for building the road was the sum of $25,000 on the 6th day of October, 1881.

During the interval between the last reference to the agreement as above stated and the commencement of this action the record shows that various attempts were made by the complainant, through its agents, to induce Mr. Johnson to accept a less sum than that stated in the agreement in settlement of his account. Its object in acting thus is plainly seen to have been necessary and advisable for its own protection, from the fact that

when it purchased the road it reserved a considerable amount in securities by way of indemnity against claims pending, or to be made against the Iron Mountain and Helena Railroad Company, whose property it had purchased in October, 1882 (Tr., p. 27).

On this point the testimony is as follows :

Q. Mr. Merriam, please state what effect, if any, had all these statements and representations of Mr. Johnson and his counsel in respect to his settlement with the Iron Mountain and Helena Railroad Company upon subsequent conduct of the St. Louis, Iron Mountain and Southern Railway Company and its officers in settling with other and unsecured creditors of the Iron Mountain and Helena Railroad Company.

A. The effect was this : We were induced by these statements and representations to believe that this agreed statement of account so frequently referred to by Mr. Johnson and his counsel was on each occasion a valid and subsisting agreement between the parties thereto. Accordingly, we always reckoned the claim of Mr. Johnson at an amount not exceeding that stated in this agreement of account, viz., $25,000. At the time these representations were made we had disbursed no portion of this indemnity fund of $52,617.50. We were induced to believe, by these statements, that it would be safe for the St. Louis, Iron Mountain and Southern Railway Company to compromise and settle the claims of unsecured creditors of the Iron Mountain and Helena Railroad, and we acted upon that belief.

The amount of these claims exceeded the amount represented to be payable at the time the purchase was made (Exhibits B and C, Tr., 34 *et seq.*), and the complainant had already been compelled to ask for an increase of the indemnity fund (Tr. p. 25). Including the $33,825 paid into the registry of the Court for the use of Johnson at the commencement of this cause, complainant has already paid $11,501.09 more than it has

realized from the indemnity fund as increased (Tr., p. 25, and Exhibit C, Tr., p. 35-38). The president of the former company had always insisted that the amount of Johnson's claim was probably not more than $12,000 or $15,000 (Tr., pp. 13, 48, 49).

It is to be noticed that the record shows that, except upon the occasion when this agreement was entered into, Johnson had never claimed any more than $21,000 as the amount due him upon his contract for building the road. He testifies himself (Tr., p. 43) as follows:

"I never agreed to accept anything except upon two occasions by the advice of my attorney; one was when I signed this paper with Bailey in Horner's office, as I have stated, and the other, by the advice of my attorney in St. Louis, he offering to take $21,000 of Governor Brown. I think I was not present when he did so, but it was with my consent that he made the offer, which, I understand, was refused by Governor Brown. I never agreed upon any amount that I would receive except upon these two occasions, or at any time except as a compromise to be paid upon the spot or within a specified time."

This offer was made by Johnson in April, 1883, after he had obtained judgment for possession of the road built by him (Tr., pp. 13, 26).

In January, 1887, this Honorable Court affirmed the judgment of the Court below in the possessory action. The complainant thereupon made new efforts to induce Johnson to accept a sum less than $25,000, but at the end of seven months, having failed in its object, it tendered to him the sum named in the agreement, which, we submit, called for the largest amount which up to this time had been claimed by Johnson, together with lawful interest thereon from the date

of the agreement, amounting in all to $33,825. Johnson having refused to accept the amount this action was immediately instituted to prevent his interference with complainant's property. We insist that upon these facts, which comprise all of the testimony upon the subject to be found in the record, *the defendant is estopped* by his use of the agreement of October 6, 1881, from claiming more than the sum tendered him by the complainant. It had been produced by the defendant Johnson voluntarily as showing the amount due him at the very first interview he had with complainant's agents after its purchase of the road. It had again been produced upon the trial of the possessory action as defendant states to contradict the evidence of Mr. Bailey as to the amount due, and it had been referred to as a settlement of the account by the attorney of the defendant verbally and in a letter which he states he was authorized to write by the defendant. No suggestion was made by the defendant to the complainant or its agents or attorneys that this agreement was conditioned or limited in its sphere in any way until in January, 1887, the defendant's right to possession having been confirmed by the Supreme Court of the United States he, for the first time to the knowledge of complainant's attorneys and agents, claimed that it was void by reason of having originally been made upon a condition, not found in the agreement and unknown to the agents of the complainant, which had not been fulfilled.

The contract of October 6th was not only reduced to writing, but it is complete in itself. It covers the whole point in dispute, which was the amount due to Johnson; and its language is that "it is agreed

* * * that the amount due said Johnson * * * under a contract executed in April, 1879, is the sum of $25,000 at this date." It is signed by both the parties. Johnson is the creditor; the railroad company mentioned in the agreement is the debtor. And now the plaintiff, Johnson, comes here with two most extraordinary propositions to defeat this agreement. The one is that there was a contemporaneous verbal contract that if this $25,000 should not be paid in cash in thirty days, or satisfactory securities delivered during the ensuing month of November, the written contract was to be null and void (Record, p. 42, fol. 131; p. 46, fol. 147; pp. 50, 51, fols. 159-162). It is not merely claimed that the terms of the written agreement of October 6th were to be varied or changed by the contemporaneous verbal understanding, but that the validity and operative force of the agreement itself was made defeasible upon a contingency—upon a contingency not only not expressed in the instrument, but inconsistent with its terms. Johnson, by this claim, endeavors to reduce the agreement, which, on its face, is unequivocal and absolute, to a mere proposition or offer that, if the railroad company would pay him $25,000 in cash within 30 days, or in securities before the end of November, he would accept it in full of the sum due him under his original contract.

This claim is in direct contradiction of the well-settled principle that parol evidence of a written agreement alleged to have been made at the time of the written agreement "can not be permitted or received to vary, qualify, contradict, to add to or subtract from the absolute terms of the written contract." Nor can it be shown that an absolute promise in writing was to

be defeasible upon some unexpressed condition. Fifty or more cases illustrating the application of this rule in similiar instances will be found collected in the second volume of Parsons on Bills and Notes, Chap. 15, pp. 501-514. Reverse the case. Suppose Johnson were suing the Iron Mountain Company on the written agreement of October 6th, claiming the $25,000; could the defendant company show that it was not to be operative upon some unexpressed contingency? This is not simply a case where an imperfect agreement is sought to be supplemented by parol evidence not inconsistent with what is expressed in writing, but it is a case where Johnson claims that the instrument has ceased to be operative because a certain unexpressed condition was not complied with. This he could not do as against the railroad company with whom he entered into the contract, nor can he do it as against its successor and privy in estate and interest. On the present theory of Johnson and his counsel this paper never could have had any operation, because they say it never was to take effect unless the amount therein specified was first paid, or the securities delivered; and if thus paid, the agreement never had any existence.

The other most extraordinary proposition of Johnson is that this agreement, though signed after so much travail, never came into existence—never had any binding force or operation, because it was never delivered, meaning by this, that he never delivered it to the Iron Mountain and Helena Railroad Company or to Bailey, its president. This is the most diaphanous pretence imaginable. The debtor was the railroad company, Johnson was the creditor, and this was the obligation

of the railroad company ; and when Johnson and his counsel stated that it was delivered to him, it was delivered to the proper party. In other words, the delivery was to be made by the railroad company to Johnson, and not in the reverse direction.

Being signed by the parties charged with the payment of the amount named in it, it was properly delivered to the party to whom such payment was to be made, namely, Mr. Johnson. Any other disposition of the paper would have been unnatural and meaningless. It was in the hands of the creditor, where it belonged. Johnson admits that he took good care of the paper, and seems, indeed, to have done so, until after the decision in the possessory action, when it occurred to him that it would be more profitable to repudiate it, and that he could retake possession of the 18 miles of road, account to no one, and name whatever figure he pleased as the price of yielding up possession to the complainant.

The motive which, perhaps unconsciously, influenced Mr. Johnson's action in changing his attitude in relation to the agreement of October 6th, 1881, is made known to us by his own testimony as to his supposed rights under the original contract for building the eighteen miles of track in question. Under that contract, in case of not being fully paid the amount therein agreed upon for the work, he claimed that he was entitled to the possession of the track of the railroad built by him, and had "the right to run, use and control the same," such right of possession and use to terminate upon his being fully paid for his work. His construction of his rights under this clause of the contract is found in his testimony (Tr., p. 45), where, in detailing the conversation

with his counsel as to the making of the contract, he said:

"I told him that if he could draw a contract that would give me possession until I was paid I could afford to do the work and wait, for it would be a valuable feeder to the Midland road, and I could make more out of it in that way than I could get for the building of it."

And in answer to the question, "Q. How was the road to be operated? Did the Iron Mountain and Helena possess any rolling stock?" he answered (Tr., p. 45):

"The Iron Mountain and Helena Railway had no rolling stock. They furnished nothing but the iron and fastenings. I was to operate the road with rolling stock belonging to the Midland, of which I had a surplus. I had plenty to operate it, and I understood that I *was not to account for the proceeds in any way.*"

Johnson's claim here set forth that he understood that he was not to account for the proceeds of the use of the road in any way has no foundation in the judgment of the Supreme Court in the possessory action or in any fair construction of the contract, and such was the judgment of His Honor, Judge CALDWELL. The decision of the Supreme Court in the forcible entry case determined only one thing, namely, that Johnson had been forcibly and unlawfully evicted and that he should be restored to the possession. It did not even determine that he was entitled to possession under his contract. It determined only the fact that he had been in peaceable possession and that he had been unlawfully ousted therefrom.

The contract and stipulation for possession therein cut no figure in the case (see Justice MILLER's Opinion 119 U. S., 608).

Nevertheless, for the purposes of the present case, the complainant was willing to concede Johnson's original possession to have been lawful, and his right to hold the road as a pledge for payment of the amount due him to be in the nature of an equitable lien on that property. The complainant denies that Johnson was entitled to possession for any other purpose. In regard to the nature of the rights of Johnson under the clause of the contract, that until the payment he was entitled to the possession and use of the eighteen miles of road, the Court below rightly regarded this as in the nature of a pledge or lien which simply entitled Johnson to hold such possession and use as security until he had been paid for the amount of work performed by him under the contract. The Court below, in deciding this case, properly held that Johnson never had any right, claim or interest in the said eighteen miles of road, except as security. Whenever the debt was paid Johnson's right of possession was ended. It was not the contract that he was to have $29,000 and all the profits of the road, in addition, but it was the contract that the maximum sum due him was $29,000, and that he was entitled to hold possession of the road and to use it for his security. These are his only rights. It follows that the situation is like unto that of a mortgagee in possession, who must account for the profits he makes out of the use and operation of the mortgaged property, and to apply them on his debt. At all events, in view of the settlement, on the 6th of October, 1891, of the amount to be $25,000, and the use, hereinbefore shown, which Johnson made of the paper in his intercourse with the complainant, and its reliance upon it, $25,000 must be taken to be the amount settled to be

due Johnson. The law, of course, takes no cognizance of any damages for withholding money due upon a contract, except the lawful interest during the time it is withheld.

Loudon vs. Taxing District, 104 U. S., 771.

These suggestions are a complete answer to the contention of Johnson that he ought to have a reversal of this judgment and an accounting of the speculative profits that he might have made by the use and operation of this road during the three or four years that he was kept out of its possession.

It thus appears that in Mr. Johnson's view he was entitled to hold the road and operate it for his own benefit without accounting for the profits to the owners or to anyone else, but to appropriate them to his own use until such time as he should be paid the full amount due for building the road, which amount he held to be indefinite, and the subject of negotiation between himself and the owners of the road. In such case it was clearly to his interest not to come to any agreement as to what was due him under his contract, and, therefore, when his right to possession was fixed by so high an authority as the Supreme Court of the United States, he was, upon his theory, practically entitled to use and operate the road for his own benefit without reference to the rights of its owners so long as it suited his convenience. His action, therefore, in exhibiting the agreement of October 6th, 1881, to the complainant after its purchase of the road, in introducing it in evidence in court and in referring to it as a contract in existence and in force up to the time when his right to possession was absolutely fixed, is easily ex-

plained, because, in the event of his failure to have his right of possession affirmed by the Supreme Court, he could then insist that under the contract of October 6th, 1881, he was entitled to $25,000, whereas, after the affirmance of his right of possession by the Supreme Court, it was to his interest to repudiate that contract, and to insist upon his right of possession for an indefinite time, to wit, the time when he should agree with complainant as to what was due him under the contract, during which time he claimed he was entitled to the possession and use of the eighteen miles of road in controversy, and to the profits therefrom, without any regard to the rights of complainant.

The testimony shows that during the seven months which elapsed between the decision of the Supreme Court and the commencement of this action, complainant, through its agents, made efforts to come to a reasonable agreement with Mr. Johnson as to the amount due under his original contract, and that such efforts proved abortive.

From the facts that none of these efforts to arrive at a settlement emanated from Johnson, and that immediately after the affirmance of the judgment in the possessory action he announced his repudiation of the agreement of October 6th, 1881, we may reasonably infer that he was not anxious that *any* sum should be agreed upon.

The further fact that the negotiations for settlement had between the parties were invariably in the direction of persuading Mr. Johnson to accept a sum less than $25,000, and never in the way of requiring complainant to pay a greater sum, is significant as showing that the

of the eighteen (18) miles of railroad mentioned in the bill," rests upon the testimony of Mr. Johnson (Tr., pp. 43–46), no other proof having been offered concerning the alleged expenditure. Nor does it appear that defendant could not have taken possession of the portion of the road in controversy without having first made such expenditure.

We ask this Court to relieve complainant from the burden, placed upon it by the decree, of paying this sum as a condition to be performed before it can have the benefit of the injunction to secure which this suit was brought.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Of Counsel.

Oct. 21, '91—50

Office Supreme Court U. S.
FILED.
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JAMES [illegible] KENNEY,
CLERK.

IN THE

Supreme Court of the United States.

A. H. JOHNSON, Appellant,

vs.

THE ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellee.

No. 60.

This is a motion of appellee to dismiss the appeal—

First. Because there has not been transmitted to this court, or filed with the transcript of record in this cause, any assignment of errors, as required by section 997 of the Revised Statutes of the United States.

Second. Because the transcript of record filed in this cause contains no exceptions to testimony or rulings of the court on matters of law.

Third. Because the transcript of record filed in this cause does not show that said appellant has furnished security to prosecute his appeal to effect, as is required by section 1000 of the Revised Statutes of the United States.

Counsel for appellant, in their brief in support of the motion, cite three cases which it is claimed held that the transcript of the record must contain an assignment of errors, prayer for reversal, and citation to the adverse party.

In the first case cited, Benites *v.* Hampton, 123 U. S., 519, there was no assignment of errors in the transcript, no specification of errors in the brief, no statement of the case presenting the questions involved or manner in which they were raised. In fact, an absolute failure in every respect to comply with the rules of this court.

In the second case cited, Dugger *v.* Tayloe, 121 U. S., 286, there was no assignment of errors in the transcript, no counsel appearing for plaintiff in error, and no specification of errors in the brief.

In the third case cited, Boston Mining Co. *v.* Eagle Mining Co., 115 U. S., 221, there was no assignment of errors annexed to or returned with the writ, no counsel appearing for plaintiff in error, no argument submitted for plaintiff in error, and no errors assigned in any form.

Each and all of the three cases cited by counsel for the motion are law cases, which could only be brought before this court by writ of error. The case at bar comes by appeal.

Counsel for appellant submit that no assignment of errors, as required by section 997 of the Revised Statutes, is necessary in the case at bar. The only requirement necessary to be observed is that the brief be in accordance with the rules of this court so as to advise counsel for appellee of the errors complained of.

In School District of Ackerly *v.* Hall, 106 U. S., 428, this court says:

"A failure to annex to or return with a writ of error an assignment of errors, as required by section 997 of the Revised Statutes, is no ground for dismissal for want of jurisdiction. If an assignment is filed in accordance with the requirements of paragraph 4, rule 21, it will ordinarily be enough."

In Gumbel *v.* Pitkin *et al.*, 113 U. S., 545, this court further says, upon motion to dismiss because "no as-

signment of errors was transmitted with the record as required by the rules of the court, and by section 997 Revised Statutes:"

"The second ground is met by the decision of this court in the case of the School District of Ackerly *v.* Hall, 106 U. S., 428, when it is said that a writ of error will not be dismissed for want of jurisdiction by reason of a failure to annex thereto or return therewith an assignment of errors pursuant to the requirements of section 997 Revised Statutes. Nor does rule 8 require a copy of assignment of errors in the transcript when no such assignment was filed in the court below."

The appeal in the case at bar was taken in open court at the term at which the decree was rendered; the allowance of the appeal was noted in the minutes (Trans., p. 55), and no citation was necessary.

Reily *v.* Lamar *et al.*, 2 Cranch, 200;
Brockett *v.* Brockett, 2 How., 238.

It is therefore apparent from the foregoing decisions that this being an appeal taken in open court at the term at which the decree was rendered, duly entered on the minutes, and not a writ of error, no assignment of errors in the transcript, no prayer for reversal, nor citation is necessary. Here appellant is represented by counsel; brief has been filed setting forth a statement of the case; the errors complained of and followed by an argument and brief of the cases relied on to support his prayer for the reversal of the decree rendered in the court below. The brief fully advises counsel for appellee of the errors complained of and is sufficient under the rulings of this court.

A. H. GARLAND,
H. J. MAY,
JOHN J. HORNER,
Attorneys for Appellant.